

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STEVEN KEY AND CHRISTINE KEY,

Respondents

v.

DIAMOND INTERNATIONAL TRUCKS F/K/A KCR INTERNATIONAL TRUCKS.

Appellant.

DOCKET NUMBER WD77323

DATE: January 27, 2015

Appeal From:

Circuit Court of Buchanan County, MO
The Honorable Weldon Clare Judah, Judge

Appellate Judges:

Division Four
Alok Ahuja, C.J. Presiding, James Edward Welsh, J., and Patrick Campbell, Sp. J.

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**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**STEVEN KEY AND CHRISTINE KEY, Respondents, v. DIAMOND
INTERNATIONAL TRUCKS F/K/A KCR INTERNATIONAL TRUCKS, Appellant.**

WD77323

Buchanan County

Before Division Four Judges: Ahuja, C.J. Presiding, Welsh, J., and Campbell, Sp. J.

Diamond International Trucks, formerly known as KCR International Trucks, Inc., appeals from the judgment entered by the circuit court following a jury verdict of \$10,000,000 in damages on Steven Key's negligence claim for personal injuries but assessing 35 percent fault to Diamond International and 65 percent fault to Key. Diamond International asserts that the circuit court: (1) erred in denying its motion for new trial because the circuit court erroneously and prejudicially rejected Diamond International's comparative fault instruction and gave an alternative comparative fault instruction, (2) erred in denying its motion for judgment notwithstanding the verdict on Key's negligence claims because Diamond International owed no duty to provide Key with the equipment needed to perform his work safely, and (3) erred and abused its discretion in denying Diamond International's motion for new trial because the circuit court erroneously and prejudicially excluded evidence of subsequent remedial measures taken by Key's employer.

Affirmed

Division Four holds:

(1) The circuit court properly rejected Diamond International's comparative fault instruction because it used an improper definition of negligence. Moreover, the record established that the alternative comparative fault instruction given by the circuit court was offered by Diamond International. Diamond International cannot complain on appeal about an instruction which they offered. But, even if the instruction was offered by Key, Diamond International never objected to the alternative comparative fault instruction on the grounds that it improperly deviated from the Missouri Approved Instructions, misstated Diamond International's burden of proof, and failed to submit the specific acts of comparative fault to the jury.

(2) Because Diamond International's failed to raise in its motion for directed verdict that it had no duty to provide wheel chocks for Key because Key was an employee of an independent contractor, it was precluded from obtaining a judgment notwithstanding the verdict in its favor on these grounds and is further precluded from obtaining appellate review of the trial court's failure to enter judgment notwithstanding the verdict on these grounds. But, even if Diamond International had preserved the issue for our review, Diamond International would not prevail. Key submitted his case on the theory that Diamond International negligently supplied Key a dangerous instrumentality for a suppliers' business purpose. Key did not submit his case to the

jury on a theory of premise liability. Thus, the "independent contractor exception" that Diamond International raises on appeal is not applicable.

(3) The circuit court did not abuse its discretion in excluding Diamond International's evidence of subsequent remedial measures taken by Key's employer. Although Diamond International's made an offer of proof, the offer of proof was not specific and definite. The circuit court's mere suggestion that Diamond International proceed with a narrative offer of proof does not relieve Diamond International of its obligation to be specific and definite in its narrative and does not preserve an otherwise deficient offer of proof for appeal.

Opinion by James Edward Welsh, Judge

January 27, 2015

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